IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
Respondent	)	
	)	
v.	)	**No. 84219**
	)	
BASSAM A. SAFFAF,	)	
Appellant	)	

On Transfer to the Supreme Court of Missouri
From the Circuit Court for the 23d Judicial Circuit,
Jefferson County, Division 2,
Honorable Gary P. Kramer, Judge

Appellant's Amended Statement, Brief, and Argument

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Court

Statute

JURISDICTIONAL STATEMENT

This is an appeal from the denial of a motion to withdraw a guilty plea. Bassam Saffaf was charged by information with the class D felony of nonsupport of a child, sec. 568.040, RSMo. He entered his guilty plea on June 28, 1999 (L.F. 2-3). On October 18 he was sentenced to five years probation, with special conditions, imposition of sentence suspended (L.F. 4, 9-10).

On September 11, 2000, Appellant pro se filed his petition to withdraw the plea (L.F. 11) which the trial court heard and denied on October 16 (L.F. 13). This order was not denominated a judgment, so an Amended Judgment was entered on November 15 (L.F. 14). Notice of appeal was filed on Monday, November 27 (L.F. 15).

There is no time limit on the filing of a motion to withdraw a guilty plea under Rule 29.07(d). Denial of such a motion is an appealable order. State v. Pendleton, 910 S.W.2d 268, 271 (Mo.App. 1995); Belcher v. State, 801 S.W.2d 372, 374 (Mo.App. 1990).

On January 16, 2001, the Court of Appeals Eastern District, after opinion, transferred the case to this Court on its own motion for reexamination of existing law and decision of a question of general interest and importance pursuant to Rule 83.02.

STATEMENT OF FACTS

The state charged Bassam Saffaf with failing in his legal obligation to support his child JTS for six months within the year 1997 (L.F. 8). When Bassam appeared with counsel to enter a guilty plea the court began by asking him if he understood the charge. He replied, "You see, she don't tell me this is my son from the beginning from what happened. She said that this boy is not my son. That's what she told me." (Exhibit 1, transcript of guilty plea, p. 2.)

Counsel conferred with defendant after which he began to answer the court, "Yes, Your Honor," and "Guilty, Your Honor" (Exhibit 1, 3), then simply to nod his head as the court went through the rights he was waiving (Exh. 1, 4-5). When asked if he understood he would be giving up his right to a jury trial, Bassam again conferred with counsel (L.F. 4). After waiving his rights in this manner defendant reaffirmed his intent to plead guilty (Exh. 1, 6).

The state offered to prove that defendant had a child with Cindy Sample and had been ordered to pay $725 per month in child support. His arrearage amounted to $31,630 (Exh. 1, 6-7). Defendant acknowledged his guilt (Exh. 1, 7-8). When the court asked if he realized any promise made to him would not bind the court, he said, "I'm sorry, I don't understand what you said." When the court rephrased the question defendant nodded that he did understand (Exh. 1, 8).

Bassam told the court he was married and the father of three other children. He drove a truck but not all the time. He had a high school education but read slowly (Exh. 1, 9-10).

The court accepted the plea, noting that the bargain between the parties was subject to defendant's ongoing effort to modify the support order, and proceeded to take evidence (Exh. 1, 12-3).

The State presented a paternity decree, payment history and arrearage calculation totaling $35,329.10 (Exh. 1, 13-5). Defendant then offered a notarized satisfaction of judgment purporting to settle his obligation with Ms. Sample for $5,000 (Exh. 1, 15-6) and an order from the civil case file, signed by an administrative hearing officer, by which the State withdrew its civil nonsupport case against defendant (Exh. 1, 16-7).

Cindy Sample testified that defendant had paid a few hundred dollars when the child was an infant but in recent years only some tax intercepts (Exh. 1, 18-9). She acknowledged signing the document releasing Defendant in February, 1999, explaining that she felt her son, twelve and a half at the time of the plea, needed to see his father (Exh. 1, 18-9). Defendant took her to a lawyer's office to sign the document and paid her the $5,000 (Exh. 1, 20-1). She felt under pressure in that this seemed to be the only way the boy could see his father (Exh. 1, 22).

Ms. Sample typed and signed another document at Bassam's behest, Exhibit C, acknowledging she had made a mistake and asking the State not to prosecute Bassam (Exh. 1, 23, 28-9). Later, alone and crying, she retyped it

because she felt it was untrue that she had made a mistake. The revised letter, Exhibit B, advised the prosecutor that Defendant was not in arrears and that she did not want to prosecute (Exh. 1, 27, 28-9).

The court refused to accept the settlement on the ground that the interests of the child had not been represented (Exh. 1, 15-6, 30-2). The court later placed Defendant on five years' probation subject to payment of arrears and his current support obligations (L.F. 4).

Defendant later filed his petition to set aside the guilty plea pro se. He alleged that he did not voluntarily and knowingly plead guilty but always wanted a jury trial. His lawyer got him to submit to pleading guilty although he did not understand the consequences of the plea. Defendant needed an interpreter to help him with the English language but his attorney insisted that the interpreter remain outside the courtroom. Bassam did not understand the proceedings or knowingly waive his rights. He had asked his lawyer to get a court order for a blood test in support of his defense that he was not the father of the child (L.F. 11-12).

Defendant appeared on the motion without counsel but with an interpreter. The court first informed him that the petition was not proper, i.e. that a Rule 24.035 motion was the remedy (T. 2). However, the court allowed Defendant to offer evidence, and he offered the plea transcript (T. 2-3). He then began to explain that his lawyer had told him to say yes or no without understanding what he was doing (T. 3).

The State argued that the transcript proved the voluntariness of the plea and that Defendant was not prejudiced because he received an s.i.s. The court denied the motion (T. 3-4).

Defendant attempted to argue through his interpreter that the transcript showed that his lawyer stopped him whenever he tried to defend himself during the plea. The court responded, “I just reviewed the transcript and I denied the petition to set aside” (T. 4-5). The judge also signed a written Memorandum denying the motion (L.F. 13).

Because this Memorandum was not denominated a judgment, the court granted defendant’s request to retitle the order “Amended Judgment” (L.F. 14).

POINTS RELIED ON

I

The appellate courts have jurisdiction of the appeal because Appellant is not attempting to appeal from the suspended imposition of sentence in that the denial of a motion to withdraw a guilty plea under Rule 29.07(d) is a separate civil order which becomes final and appealable independently of any sentence and judgment in the criminal case.

State v. McCollum, 610 S.W.2d 81 (Mo.App. 1980)

State v. England, 599 S.W.2d 942 (Mo.App. 1980)

State v. Fensom, WD59302 (Nov. 20, 2001)

State v. Davis, 438 S.W.2d 232 (Mo. 1969)

Rule 29.07(d)

Rule 24.035

II

The trial court erred in denying the petition to set aside the guilty plea because Defendant sufficiently alleged that his plea was not voluntarily and understandingly made because of his poor understanding of English and the ineffective assistance of counsel, and these allegations cannot be refuted on the record of the guilty plea alone, in that Defendant alleged that he wanted a jury trial to present his defense of non-paternity but counsel did not investigate that defense but insisted that he plead guilty without understanding the consequences and without the assistance of an interpreter, without whom Defendant did not knowingly and understandingly waive his rights.

State v. Sultan, 14 S.W.3d 96 (Mo.App. 2000)

Buckner v. State, 995 S.W.2d 47 (Mo.App. 1999)

State v. Bonds, 521 S.W.2d 18 (Mo.App. 1975)

Bauer v. State, 926 S.W.2d 188 (Mo.App. 1996)

Rule 29.07(d)

Rule 24.035

ARGUMENT

I

The appellate courts have jurisdiction of the appeal because Appellant is not attempting to appeal from the suspended imposition of sentence in that the denial of a motion to withdraw a guilty plea under Rule 29.07(d) is a separate civil order which becomes final and appealable independently of any sentence and judgment in the criminal case.

In its opinion the Court of Appeals Eastern District dismissed the appeal for lack of jurisdiction because there was no final judgment in a case where imposition of sentence had been suspended. In his concurring opinion Judge Draper felt compelled to agree but regretted the absence of a remedy where Appellant had made colorable allegations of involuntariness of the plea due to ineffective assistance of counsel, a poor command of the English language, and a defense of non-paternity.

In its order granting transfer the Court of Appeals noted an inconsistency meriting reexamination of existing law with the decision in State v. Fensom, WD59302 (Nov. 20, 2001), in which the Western District held that it had jurisdiction of an appeal from an order denying a motion to withdraw a guilty plea in a case where the defendant had not yet been sentenced.

In effect the Eastern District held that the denial of the motion to withdraw is identical with, or merged in, the criminal case. This is wrong because the denial

of the motion to withdraw was a final order in a proceeding which is civil in nature and independent of any conviction or s.i.s. Furthermore, the motion to withdraw runs on a different timeline from the criminal case so that it does not necessarily become appealable at the same time. Appellant is not attempting to appeal from the s.i.s. but from his petition to withdraw his plea.

The procedure to withdraw a plea is codified in Rule 29.07(d), which reads:

> A motion to withdraw a plea of guilty may be made only before sentence is imposed or *when imposition of sentence is suspended*; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. [Emphasis added.]

By its plain terms the rule entitled Bassam to file a motion to withdraw when imposition of sentence was suspended. After sentence a motion is less favored, being subject to the manifest injustice standard. Therefore Appellant should not be required to wait until sentence is imposed.

When a motion filed before sentencing is denied it is that denial which is an appealable order, not the subsequent conviction and sentence. State v. England, 599 S.W.2d 942, 943 (Mo.App. 1980). In State v. O'Neal, 626 S.W.2d 693 (Mo.App. 1981), the court said, "a difference has been recognized between an appeal from an order denying such withdrawal and an appeal from a judgment imposing the sentence on the defendant." Id. at 693.

In State v. McCollum, 610 S.W.2d 81, 82 fn. 1 (Mo.App. 1980), the Eastern District said, "Although appellant's notice of appeal is not entirely clear, the appeal is properly from the order denying appellant's motion to withdraw his guilty plea and not from the judgment of conviction." In this case the notice of appeal describes the judgment appealed from as "Denial of motion to set aside guilty plea" (L.F. 15).

There is no material difference under the rule between "before sentence is imposed" and "when imposition of sentence is suspended." In neither case is there a final criminal conviction. The order denying the motion to withdraw is separate and apart from any conviction. In fact, it is *civil* in nature, State v. Davis, 438 S.W.2d 232, 234 (Mo. 1969), which further demonstrates that it is entirely separate for purposes of appeal.

If Appellant were to wait until his probation was revoked and sentence was imposed he would be unable to appeal. The Eastern District held in Belcher v. State, 801 S.W.2d 372, 374 (Mo.App. 1990), that a defendant could not raise the issue of withdrawal of his guilty plea in a Rule 24.035 motion filed after the motion to withdraw had become final and appealable and he had failed to avail himself of that earlier opportunity to appeal. In other words, the denial of a motion to withdraw is a separate, appealable judgment from the criminal conviction.

Time Limitations

There are no time limits on a Rule 29.07(d) motion. State v. Pendleton, 910 S.W.2d 268, 271 (Mo.App. 1995). Thus the time for appeal does not necessarily correspond to the time of the final judgment of conviction. A presentencing motion could be denied while the date for sentencing was continued until after the time for appeal had passed.

In postsentencing cases it used to be possible to appeal a motion filed years after conviction; in State v. Parker, 413 S.W.2d 489 (Mo. Banc 1967), the motion under Rule 27.25, the predecessor of Rule 29.07(d), was filed nearly three years after the plea. This is no longer possible because of cases which apply the time limitations of Rule 24.035 to Rule 29.07(d) in order to prevent 24.035 from being circumvented. State v. Ryan, 813 S.W.2d 898 (Mo.App. 1991). However, a postsentencing motion to withdraw could still be filed after the time for direct appeal of the guilty plea had expired. Rule 24.035(b) ("If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections"). Clearly it would still be appealable.

Where imposition of sentence is suspended, the defendant's discharge after successfully completing probation would put a term to the opportunity to file a 29.07(d) motion. State v. Ortega, 985 S.W.2d 373, 374 (Mo.App. 1999).

However, nothing in the law either dictates or guarantees that the denial of a presentencing motion to withdraw and the imposition of sentence will coincide

in time so as to be jointly appealable. Therefore the Court should adhere to the plain meaning of Rule 29.07(d) and permit an appeal even when imposition of sentence is suspended.

Another reason the appeals are separate is that the grounds are completely different. The only grounds cognizable on direct appeal from a guilty plea are the jurisdiction of the court and the sufficiency of the indictment or information. State v. Evans, 989 S.W.2d 662, 663 fn. 4 (Mo.App. 1999). The grounds for a motion to withdraw are that the defendant was misled or induced to plead guilty by fraud, mistake, misapprehension, coercion, duress or fear. Pendleton, 910 S.W.2d at 270. This is further proof that the motion to withdraw is not identical with, nor is it merged in, the judgment of conviction.

Shambley and Waters

The Eastern District's decision in State v. Shambley-Bey, 989 S.W.2d 681 (Mo.App. 1999), the only previous case on point, does indeed say that a motion to withdraw cannot be appealed where the defendant got an s.i.s. Shambley is a two-paragraph per curiam opinion in a case where the defendant was pro se. Undoubtedly the court had little if any help from the defense. The only case relied on in Shambley is State v. Waters, 882 S.W.2d 269 (Mo.App. 1994), a case which is ambiguous and explains why Shambley is unsound.

Waters, who got an s.i.s., attempted to appeal from the "judgment and sentence," not the motion to withdraw. Of course that was impossible since there

was no judgment and sentence. He raised two grounds: (1) there was no factual basis for the plea, and (2) the trial court erred in overruling his motion to withdraw the plea. The first ground was clearly an attempt to appeal from the guilty plea itself, and the Southern District correctly held that he could not because the s.i.s. was not a final judgment.

Only in oral argument did Waters' attorney cite the rule that appeal lies from an order denying leave to withdraw, but counsel fatally relied on a case in which the motion to withdraw was filed after the sentence. This led the Southern District to dismiss the precedent as inapplicable and treat Waters solely as an attempt to appeal the s.i.s. Indeed, the court said, "If the defendant is sentenced on account of a probation violation, he would then be entitled to appeal from the *conviction and sentence*." 882 S.W.2d at 270 (emphasis added). True, but as Appellant has shown, he would *not* be entitled to appeal the denial of his motion to withdraw. Waters fails to draw the necessary distinction between the two grounds raised on that appeal. As a result, Shambley reached the wrong conclusion.

It may be the intention of Shambley to allow a defendant with an s.i.s. to appeal his 29.07(d) motion if and when his probation is revoked and sentence is imposed. That might be a desirable solution, but it runs counter to Missouri law. Appellant does not want to run that risk only to be told on authority of Belcher, McCollum et al. that he has forfeited his right to appeal. If it seems illogical for him to have that right, it must be remembered that nothing in the law distinguishes the appealability of a motion with or without an s.i.s. Furthermore, as Judge

Draper pointed out in his concurring opinion for the Court of Appeals, an s.i.s. has collateral consequences, and there may be reasons why a defendant should be allowed to challenge the validity of his plea regardless of the ultimate disposition.

The conflict in the case law must be resolved in favor of State v. Fensom, WD59302: denial of a motion to withdraw a plea is appealable even before sentencing.

II

The trial court erred in denying the petition to set aside the guilty plea because Defendant sufficiently alleged that his plea was not voluntarily and understandingly made because of his poor understanding of English and the ineffective assistance of counsel, and these allegations cannot be refuted on the record of the guilty plea alone, in that Defendant alleged that he wanted a jury trial to present his defense of non-paternity but counsel did not investigate that defense but insisted that he plead guilty without understanding the consequences and without the assistance of an interpreter, without whom Defendant did not knowingly and understandingly waive his rights.

Bassam's petition must be understood as a motion to withdraw his guilty plea under Rule 29.07(d). Contrary to the trial court's initial impression, Rule 24.035 was unavailable because it applies only after sentence has been imposed. State v. Pendleton, 910 S.W.2d 269, 270-1 (Mo.App. 1995).

Nevertheless, the court purported to consider the petition further before denying it (T. 4) and then to have reviewed the transcript of the plea before repeating the denial (T. 5). The court's action was perfunctory, but at best it can be affirmed as correct only if the transcript of the guilty plea alone suffices to refute Defendant's allegations; no other evidence was considered.

On appeal the denial of a presentence motion to withdraw a guilty plea is reviewed for abuse of discretion. The accused is not entitled to withdraw his plea

as a matter of right but only in extraordinary circumstances such as a showing of fraud, mistake, misapprehension, fear, persuasion, or the holding out of false hopes. State v. Taylor, 929 S.W.2d 209, 215 (Mo. Banc 1996). The proceeding is civil in nature, and the movant has the burden of proof by a preponderance of the evidence. State v. Davis, 438 S.W.2d 232, 234 (Mo. 1969).

Defendant's grounds for relief boil down to two: his plea was involuntary because he did not adequately understand what was going on, and it was involuntary as a result of ineffective assistance of counsel (L.F. 11-2).

To establish ineffective assistance on a guilty plea Defendant must show that counsel's representation fell below an objective standard of reasonableness and that the outcome would otherwise have been different. He must show a reasonable probability that, but for counsel's errors, he would have insisted on a trial rather than plead guilty. Sharp v. State, 908 S.W.2d 752, 757 (Mo.App. 1995).

Defendant alleged that he wanted a jury trial all along. He asked his attorney to investigate, if possible by means of a court-ordered blood test, his claim that he was not the child's father (L.F. 11). Paternity is an element of the offense which the State must prove and the defense could rebut by this means. State v. Hoy, 742 S.W.2d 206, 207-8 (Mo.App. 1987). Instead, Bassam's counsel induced him to plead guilty by instructing him to answer yes or no without understanding the consequences and by excluding his interpreter from the courtroom (L.F. 12).

The record does not refute these allegations. On the contrary, the first thing Bassam did at the plea was to deny that he was the father (Exh. 1, p. 2). Counsel conferred with him off the record to get him to accept the plea (Exh. 1, 2-3, 4). At a minimum the trial court erred in denying the petition without an evidentiary hearing. Bauer v. State, 926 S.W.2d 188, 191 (Mo.App. 1996).

In Buckner v. State, 995 S.W.2d 47 (Mo.App. 1999), the court remanded for a hearing to resolve the question successfully raised by the movant in his 24.035 motion, whether his plea was rendered involuntary because counsel failed to pursue or explain to him a possibly meritorious motion to suppress evidence. Bassam similarly fulfilled the pleading requirements.

Bassam also alleged that his plea was involuntary independently of the conduct of counsel because he did not fully understand what was said. “Defendant didn’t understand everything, whatever was beening [sic] said during the guilty plea.” “Defendant never understood and never made a knowing and willful waiver of this rights [sic] to a jury trial” (L.F. 12).

Before a guilty plea is effective the record must show that the defendant understands and freely relinquishes his constitutional rights. It is a manifest injustice if a language barrier prevents him from doing this. State v. Sultan, 14 S.W.3d 96, 98 (Mo.App. 2000). In Sultan the Western District reversed the denial of a Rule 29.07(d) motion because the defendant, an Iraqi only in the United States for one year, had shown that, though he knew some English, his plea was not

effective. 14 S.W.3d at 99. The court remanded with directions to set aside the plea.

In State v. Bonds, 521 S.W.2d 18 (Mo.App. 1975), the plea court sentenced defendant to three years instead of the six months agreed on by the parties. Defendant filed motions to set aside the plea under Rules 27.25 and 27.26, the predecessors of 29.07(d) and 24.035 respectively. The court heard the prosecutor and defense attorney on the motions but refused to let the defendant testify. The court on appeal held that this was error which "foreclosed exploration of this critical factual issue" of whether the defendant understood at the plea that the court could disregard the plea bargain. 521 S.W.2d at 20. The court remanded with instructions to set aside the plea. Id. at 21. The trial court in this case erred in refusing to hear Defendant.

Finally, the court here made no findings in explanation of its ruling. It could well be that the perfunctory way in which the court dealt with Bassam's petition followed from its first impression that the motion was not permissible because it had not been brought under Rule 24.035. In State v. Rose, 440 S.W.2d 441, 446 (Mo. 1969), a Rule 27.26 case, the court remanded for specific findings on the factual issues, with leave to the parties to reopen the case for further evidence.

The precedents thus hold open a full range of remedies. This Court should reverse with instructions to set aside the guilty plea because the plea transcript alone shows that Bassam was coached by counsel during the plea, wanted to

pursue a defense of non-paternity (Exh. 1, 2-3, 4), and answered the court's questions mechanically, without understanding the consequences of his plea (Exh. 1, 3-6, 7-8). State v. Sultan, 14 S.W.3d at 99.

Alternatively, because the existing record does not refute the allegations in Bassam's petition, the Court should remand for an evidentiary hearing. Bauer v. State, 926 S.W.2d at 191. Defendant was unrepresented by counsel and did not tender witnesses for direct and cross-examination; however, he attempted to plead his case and thus made clear through his interpreter that he wanted to be heard (T. 3, 4-5).

Finally, at a minimum, the Court should remand for findings of fact and conclusions of law with leave for Defendant to produce evidence in support of his allegations. Rose, 440 S.W.2d at 446.

CONCLUSION

Wherefore appellant prays the Court to reverse the denial of his petition to set aside the guilty plea and remand to the trial court with directions to set aside the guilty plea and allow Appellant to plead anew, or with directions to hold an evidentiary hearing on the petition and make specific findings of fact and conclusions of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned counsel certifies that this brief complies with Rule 84.06(b); that it contains 4,623 words; and that it is accompanied by a disk which has been scanned for viruses and is virus-free.

Two copies of this brief, and a copy of the brief on disk, have been mailed to the Attorney General, attorney for Respondent, this day of February, 2002.

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